In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-82

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, PETITIONER

v.

BEN CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA AND TO THE SUPREME COURT OF THE STATE OF GEORGIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation of October 20, 1975. The question presented is whether the National Labor Relations Act preempts a state court suit for damages brought by an employee who alleges that the union wrongfully caused him to be denied employment, and injured his reputation. The United States is of the view that the record at this stage of the proceedings is inadequate for consideration of this question.

STATEMENT

Ben Carter filed a complaint in the Superior Court of Richmond County, Georgia, alleging that the Sheet Metal Workers' International Association (the International) and its affiliated Local 85 (the Local) "conspired together, maliciously and wilfully, to deprive the plaintiff of

his employment in the Sheet Metal Industry, and of his means of livelihood, to cause the plaintiff to be denied employment in this Industry, to deny the plaintiff his right and privilege to be a member of defendants' union, to impair the plaintiff's reputation among prospective employers, and to subject the plaintiff to embarrassment, scorn and derision among his friends, associates, relatives and fellow employees" (Pet. App. 18a-19a). The complaint further alleged that, in furtherance of this conspiracy, the defendants "maliciously * * * used the threat of union coercion and pressure to cause the plaintiff to be denied employment of a job in his industry * * * [and] coerced and forced an employer of the plaintiff to dismiss the plaintiff from a job in his industry which he then presently held" (Pet. App. 19a). "As a result of the aforesaid acts, the plaintiff has been unable to find employment in his industry" (*ibid.*). The complaint sought actual damages, including lost wages, of $25,000, punitive damages of $50,000, and attorney's fees of $10,000 (Pet. App. 19a-20a).

A default judgment was entered against the petitioner,the International, upon its failure to file a timely answer to the complaint (Pet. App. 21a-22a). The Local filed a timely answer.

Thereafter, both defendants filed motions to dismiss the complaint on grounds that the subject matter was preempted by the exclusive jurisdiction of the National Labor Relations Board. The superior court denied the motions to dismiss (Pet. App. 23a), and both defendants appealed to the Georgia court of appeals, which affirmed the denials (Pet. App. 2a-7a).[1]

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[1]Denial of the motions to dismiss leaves the International with a default judgment against it on the merits, but facing trial on the issue of damages (Pet. App. 21a-22a), while the Local faces trial on both the merits and the damage issue. The superior court denied the International's motion for a separate trial.

The court of appeals ruled that "an alleged malicious and wilful tort with a claim for punitive damages is not within the exclusive federal regulatory scheme" (Pet. App. 7a). Noting the Board's lack of power to grant punitive damages, the court quoted this Court's statement in *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 63-64, that "* * * The Board can award no damages, impose no penalty, or give any other relief to the defamed individual. On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary argument for pre-emption * * *" (Pet. App. 5a). The Georgia court also relied on the statement in the concurring opinion in *Taggart* v. *Weinacker's, Inc.,* 397 U.S. 223, 228, that *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, "left to the States the power to regulate any matter of 'peripheral concern' to the NLRA or that conduct that touches interests 'deeply rooted in local feeling and responsibility' " (Pet. App. 4a).

The Supreme Court of Georgia denied the International's application for certiorari to review the judgment of the court of appeals (Pet. 1a). The International then filed the instant petition for a writ of certiorari.

DISCUSSION

Although there is a threshold question whether the denial of a motion to dismiss constitutes a "final judgment" within the meaning of 28 U.S.C. 1257, the question of finality need not be reached because the skeletal nature

of the record makes this case inappropriate for review at this stage of the proceedings.[2]

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[2]Only the International—which is under a default judgment—is petitioning for review of the Georgia court's denial of its preemption claims. That court considered the merits of the preemption issue despite the default, apparently on the ground that, if the lower court lacks jurisdiction over the subject matter, the default judgment is void and the case should be dismissed. *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363 (antitrust default judgment reversed following determination of damages, on ground that Civil Aeronautics Board jurisdiction preempted the subject matter). The question of damages owed by the International remains to be decided. When that question is resolved, the International will be able to raise again the preemption issue on petition to this Court from the Georgia courts, even if certiorari is denied in this proceeding. *Hughes Tool Co.* v. *Trans World Airlines, supra,* 409 U.S. at 365, n. 1.

The requirement of finality functions to prevent "piecemeal review of state court decisions." *North Dakota Pharmacy Board* v. *Snyder's Stores,* 414 U.S. 156, 159. However, in Local No. 438, *Construction and General Laborers' Union* v. *Curry,* 371 U.S. 542, 550, the Court held that "[t]he policy of 28 U.S.C. §1257 against fragmenting and prolonging litigation and against piecemeal reviews of state court judgments" did not bar review of a state court temporary injunction alleged to be preempted by the Board's exclusive jurisdiction, where issuance of the temporary injunction "may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board." *Ibid.* The Court further pointed out that there were no actual issues left for determination by the state courts on the merits, because the state courts had in fact conclusively ruled on the merits in the temporary injunction proceedings, finding that the picketing in issue violated the Georgia right-to-work laws. Thus, the Court concluded that "[s]ince there was nothing more of substance to be decided in the trial court, the judgment below was final within the meaning of 28 U.S.C. §1257" (*id.* at 551). And see *Avery* v. *Midland County,* 390 U.S. 474, 478, n. 2; *Mills* v. *Alabama,* 384 U.S. 214, 217-218.

In this case, no injunction has issued and the state court has not decided whether the conduct alleged in fact violates state law. At the subsequent trial, it is open to the Local to defend on that basis, and, in so doing, it may more clearly delineate the preemption issue (see *infra,* pp. 5-7). Similarly, while only the damage issue is open to the International at a further trial, the facts on damages may likewise place the preemption issue in better focus.

a. The complaint alleges two instances of a denial of employment opportunities (Pet. App. 19a), but the employers are neither identified nor is there any other indication that their operations affect commerce to the extent that the Board would have asserted jurisdiction over them. Cf. *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255. While Carter's failure thus far to deny the requisite effect on commerce suggests that the employers were subject to the Board's jurisdiction (see *Local Union of the United Association of Journeymen* v. *Borden*, 373 U.S. 690, 694, n. 4 ("*Borden*"); *Local No. 207, Int'l Assoc. of Bridge Workers Union* v. *Perko*, 373 U.S. 701, 705, n. 3 ("*Perko*"), a trial would doubtless amplify the jurisdictional facts.

b. There is an allegation of union interference with employment opportunities, but no details as to why the unions took such action against Carter. Similarly, there is an allegation that the unions improperly denied Carter union membership, but no allegation that the alleged interference with employment was due to lack of union membership (Pet. App. 19a).

If the unions' interference with Carter's employment ship or because of some dereliction on his part concerning union obligations (other than the financial obligations which could be imposed under a valid union security agreement), their action would violate Section 8(b)(1)(A) and (2) of the National Labor Relations Act (NLRA), as amended, 29 U.S.C. 158(b)(1)(A) and (2).[3] In contrast, if the unions were merely enforcing lawful

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[3] *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40-42; *National Labor Relations Board* v. *Int'l Hod Carriers*, 295 F.2d 657, 658 (C.A. 7); *National Labor Relations Board* v. *Teamsters, Local 182*, 228 F. 2d 83, 84 (C.A. 2); *Local 1437, Carpenters*, 210 NLRB 359, 360.

contractual arrangements which precluded Carter's hiring, their actions would be protected by Section 7 of the Act, 29 U.S.C. 157.[4] In either case, contrary to the view of the Georgia court of appeals, the state suit would be barred by the NLRA (assuming Board "commerce jurisdiction" over the employers involved). See *Borden* and *Perko, supra*; and *Amalgamated Assoc. of Street Employees* v. *Lockridge,* 403 U.S. 274 ("*Lockridge*"). These cases make plain that, irrespective of the label affixed to the cause of action under state law, where the crux of that action is that a union has caused an employee to be deprived of employment opportunities because of "union" considerations, the matter is exclusively for the Board to adjudicate. Nor is it relevant that the Board cannot award the full panoply of remedies which the state could provide. With respect to matters of employment discrimination, which, unlike libel (involved in *Linn, supra*), are central, and not merely peripheral, to the regulatory scheme of the NLRA, "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Lockridge, supra,* 403 U.S. at 287.

On the other hand, if the unions' action against Carter were prompted by reasons unrelated to his lack of union membership or failure to comply with union obligations, the preemption issue would become more complex. If the unions were Carter's bargaining representative, their action might entail a breach of their duty of fair representation. But while a federal standard governs determination of that question, the courts, as well as the Board, have jurisdiction to enforce that duty. *Vaca* v. *Sipes,* 386 U.S. 171. And if the unions owed Carter no duty of fair representation, or their allegedly tortious conduct had no relation to Carter's right to join or refrain from joining

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[4] *Local 357, Teamsters* v. *National Labor Relations Board,* 365 U.S. 667; *Boston Cement Masons & Asphalt Layers Union No. 534 (Duron Maguire Eastern Corp.),* 216 NLRB No. 90, 88 LRRM 1348; *Local 673, Laborers International Union,* 171 NLRB 894, 899, and cases at n. 8.

the union, their conduct might be wholly outside the interests which the National Labor Relations Act is designed to protect. Cf. *Lummus Co.* v. *National Labor Relations Board*, 339 F. 2d 728, 733-735 (C.A.D.C.). The record as it now stands leaves these questions wholly unilluminated.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] *Borden, Perko,* and *Lockridge, supra,* came to the Court after the facts were fully developed at a trial.

Another matter warranting clarification is whether the assertion in the complaint that the unions impaired Carter's "reputation among prospective employers" and subjected him "to embarrassment, scorn and derision among his friends, associates, relatives and fellow employees" (Pet. App. 19a) refers to alleged libelous conduct on the part of the unions. Under *Linn, supra,* 383 U.S. at 65, the state remedy for libel is limited by a federal "malice test to effectuate the statutory design with respect to" preservation of the NLRA's guarantees of free discussion, but the courts clearly have jurisdiction to decide the question.